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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 31

BALTIMORE CONTRACTORS, INC.,
Petitioner,

vs.

JACOB H. BODINGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

Neither the opinion of the district court (R. 21-22) nor that of the United States Court of Appeals for the Second Circuit (R. 22) is reported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 11, 1953 (R. 22). The petition for a writ of certiorari was filed on March 8, 1954, and was granted on April 12, 1954. (R. 30). The jurisdiction of this Court rests upon 28 USCA 1254 (1).

Question Presented

Whether in an action for an *accounting* an order denying a stay under section 3 of the United States Arbitration Act should be regarded as a denial of an interlocutory injunction from which an appeal lies under section 1292 (1) of the Judicial Code.

Statutes Involved

Title 9 USCA section 3 (U. S. Arbitration Act):

> "*Stay of proceedings where issue therein referable to arbitration*
>
> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Title 28 USCA section 1292 (1):

> "*Interlocutory decisions*
>
> "The courts of appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the district courts of the United States, * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, * * *".

Statement

This action for an accounting and for a judgment for a share of net profits under a written agreement was com-

menced by Jacob H. Bodinger, respondent, in the Supreme Court of the State of New York, County of New York in April, 1953, and was removed by petitioner to the United States District Court for the Eastern District of New York on the ground of diversity of citizenship (R. 3, 6-7, 13, 18).

Paragraph "Third" of the agreement sued on in part provides (R. 18, 8, 22):

> "In the event of any dispute in the calculation of the net profits under this paragraph Frenkil (referring to petitioner's president) shall select either Wooden and Benson or Haskins and Sells or an accountant or auditor named by either of them whose determination of all such disputes shall be final and binding upon all parties to the dispute."

Petitioner moved for a stay of the action (R. 3, 21) pursuant to the provisions of section 3 of the United States Arbitration Act (9 USCA 3) authorizing such a stay "upon any issue referable to arbitration under an agreement in writing for such arbitration."

On November 4, 1953, the district court passed an order denying petitioner's application for a stay pending arbitration (R. 5-6) from which order petitioner took an appeal to the United States Court of Appeals for the Second Circuit (R. 4) on November 9, 1953.

On December 7, 1953, respondent moved the Court of Appeals for an order dismissing the appeal on the ground that the order appealed from was not an appealable order (R. 1, 2). On December 11, 1953, the Court of Appeals granted respondent's motion to dismiss the appeal by entering an order reading "Motion granted. See *Morgantown v. Royal Ins. Co.*, 337 U. S. 254" (R. 22).

By an order of this Court entered on December 29, 1953, all proceedings before the district court were stayed pending timely filing and disposition of a petition for certiorari.

Summary of Argument

Ever since 1935, when this court decided *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U. S. 449, an order granting or refusing a stay under section 3 of the United States Arbitration Act has been regarded as an interlocutory injunction from which an appeal lies under the provisions of the Judicial Code now consolidated in 28 USCA 1292 (1). This was so whether the action sought to be stayed was brought on the "law side" or the "equity side" of the district court. See *Hudson Lumber Co. v. U. S. Plywood Corp.* (CA 9) 181 F. 2d 929, where the action was on the "equity side", and *Markel Elec. Products v. United Elec. R. M. W. of Am.* (CA 2) 202 F. 2d 435, where the action was on the "law side". The Court of Appeals for the Second Circuit, however, in the instant case has ruled in direct conflict with the *Hudson Lumber Co.* case, *supra*, that such an order is *not* appealable when the action is brought on the "equity side".

Respondent concedes that in an action at law, an Arbitration Act order is appealable but seeks to draw a distinction between an action at law and one in equity, relying on the fictional injunction theory applied in *Enelow v. New York Life Ins. Co.*, 293 U. S. 379, and in *Ettleson v. Metropolitan Life Ins. Co.*, 317 U. S. 188.

The fiction of *Enelow* and *Ettelson* seem to have been done with by the majority of this Court in *Morgantown v. Royal Ins. Co.*, 337 U. S. 254. (See Moore's *Commentary on the U. S. Judicial Code* (1949 ed.) paragraph 0.03 (52) pp. 492-494). But whether or not that fiction still prevails,

petitioner contends (1) that an Arbitration Act stay order is a statutory stay authorized by the Congress to be granted in a cause *before* the district court pending determination of issues in *another cause*, namely, the arbitration proceeding; (2) that such a stay is injunctive in character (a) because in staying one cause in favor of another, the normal equitable principles underlying the injunctive processes are invoked; (b) because non-appealability of such an interlocutory stay order would give rise to judicially sanctioned irreparable procedural injury which could not be undone by an appeal from the final order and (c) because this Court has in effect held in the *Shanferoke* case, 293 U. S. 449, *supra*, that such a stay order is injunctive in character and therefore appealable.

Argument

An Order Denying a Stay Under Section 3 of the United States Arbitration Act Should be Regarded as an Interlocutory Injunction Appealable Under Title 28 USCA Section 1292 (1).

A brief historical review of Title 28 USCA section 1292 (1) will show that interlocutory injunctions are appealable. When the circuit courts of appeals were established by the Act of 1891, section 7, provision was made for an appeal from an "interlocutory order or decree granting or continuing" such an injunction (26 Stat. 828). The section was amended by the Act of February 18, 1895, c. 96, 28 Stat. 666, to give an appeal where an interlocutory injunction was *refused* or *dissolved*. Although this additional provision for appeal was repealed by the Act of June 6, 1900, 31 Stat. 660 (*March v. Romare* (CA 5) 116 F. 354), it was restored in the broadest terms by section 129 of the Judicial Code, 28 USCA 227 (1940) and is substantially carried forward as Title 28 USCA section 1292 (1). See Moore's

Commentary on The U. S. Judicial Code (1949 ed.) page 42, note 15 in subhead (5).

The first case in which this Court passed on the appealability of an arbitration act stay order was *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U. S. 449, decided in 1935. There an action at law for damages for breach of a contract was stayed under section 3 of the United States Arbitration Act, and Mr. Justice Brandeis, speaking for this Court said (p. 451): "Being an interlocutory order, it was appealable to the Circuit Court of Appeals under §129, only *if the denial of the stay should be deemed the denial of an injunction*" (italics supplied). The denial of the stay was held to be the denial of an injunction. Applying the theory of *Enelow v. New York L. Ins. Co.*, 293 U. S. 379, the opinion stated that: "an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under §274 b. U.S.C. Title 28 §398, is appealable under §129; * * * and that the motion for a stay is an application for an interlocutory injunction based on the special defense" (293 U. S. 452).

What is known as an "equitable defense" stemmed from the old English chancery practice under which the law-defendant with the basis went into equity as a plaintiff and obtained an injunction against the law-plaintiff from further prosecuting his law action. If the law action was stayed pending final determination of the equity action, the law-defendant was granted an interlocutory injunction which *in fact* was issued by the chancellor.

But in federal practice, separate law and equity courts have never existed, although there was a law and an equity side which was not completely changed by The Law & Equity Act of 1915 (28 USCA 397, 398) (see 2 Moore's *Federal Practice*, (1948 ed.) par. 2.05 [2], p. 336, etc.).

In the *Enelow* case, an equitable defense of fraud in obtaining a life insurance policy was interposed in the suit on the policy brought on the law side of the court and the equitable issues were set down for trial prior to the legal issues on the theory that an interlocutory injunction had been granted against the action at law although *in fact* none had been issued.

Later, even after the Federal Rules had united law and equity, thereby abolishing the law and equity side, the fictional injunction of the *Enelow* case was again used in *Ettelson v. Metropolitan Life Ins. Co.*, 317 U. S. 188, in a similar situation and the interlocutory order was held to be an interlocutory injunction, and therefore appealable.

Then came *Morgantown v. Royal Ins. Co.*, 337 U. S. 254, where the theory of the *Enelow* case and the fictional injunction could have been, but was not applied by the majority of this Court. This was an action for reformation of an insurance policy on the basis of mutual mistake; the defendant denied mistake and filed a counterclaim to recover on the policy as written. After issue was joined on the counterclaim, the defendant filed a demand for a jury trial under Rule 38(b) and the district court granted the plaintiff's motion to strike the demand and set the case for trial by the court without a jury. On appeal, the court of appeals refused to treat the interlocutory order as an order granting or denying an injunction and dismissed the appeal. This Court affirmed. It could have, according to Professor Moore,* "applied historical analogies and reached the same result: that an order denying the defendant a jury trial on his counterclaim at 'law' interposed in plaintiff's suit in 'equity' in advance of the plaintiff's equitable issues was

* Moore's *Commentary on The U. S. Judicial Code*, pp. 493-494

not an injunction by a chancellor, but a mere stay of the legal proceedings by a common law judge. [This is the position taken by Justice Frankfurter in his concurring opinion.] Mr. Justice Murphy speaking for the majority of the Court did not choose to do so. While he did not expressly overrule *Enelow* and *Ettelson*, his theory and language impliedly do. 'This is not a situation, he stated, where a "chancellor" in denying a demand for jury trial can be said to be enjoining a "judge" who has cognizance of a pending action at law. This is rather a case of a judge making a ruling as to the manner in which he will try one issue in a civil action pending before himself. The fiction of a court with two sides, one of which can stay proceedings in the other, is not applicable where there is no other proceeding in existence to be stayed. The ruling from which the appeal in this case was prosecuted is an order interlocutory in form and substance. Nothing in the language of the rules or the Judicial Code brings it within the class of appealable decisions, and distinctions from common-law practice which supported our conclusions in the *Enelow* and *Ettelson* cases supply no analogy competent to make an injunction of what in any ordinary understanding of the word is not one.' [Justices Black and Rutledge dissenting regard the case as overruling *Ettelson v. Metropolitan Ins. Co.*]."

But whether or not the theory of the *Enelow* case has been overruled by implication, it is submitted that there is no need to resort to a legal fiction in order to uphold the order in the instant case as an appealable order. Here the district court is empowered by section 3 of the Arbitration Act to enjoin the action *in fact* before it in favor of issues to be tried in an arbitration proceeding.

This is not "a case of a judge making a ruling as to the manner in which he will try one issue in a civil action pending before himself" but rather a case in which an action *before* the district court is stayed while issues are to be tried in *another forum* pursuant to the written agreement between the parties (R. 18, 8, 22). The arbitral proceeding is not a part of the accounting action instituted by respondent, nor is the accounting action a part of the arbitration proceeding. Since each is independent of the other and in a different forum, *enjoining or refusing to enjoin the prosecution of the one in favor of the other* should be regarded as the grant or refusal of an injunction.

This, we submit, is the rationale of the rule in the *Enelow* case where Mr. Chief Justice Hughes, in interpreting section 129 of the Judicial Code, now §1292, said for this Court (293 U. S. pp. 381-382):

> "This section contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, as distinguished from a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice. The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of §129."

Certainly, if the district court can invoke its general equitable jurisdiction to issue a fictional injunction to stay a proceeding "in another court" there seems to be no reason why it cannot invoke that power to stay a proceeding actually before it in favor of issues to be tried in another

forum. Whether the stay order arises out of a fictional proceeding, as in the *Enelow* case, or by virtue of an Act of Congress, as in the present case, the injunctive character of the stay order is the same. In either event, the order stays one proceeding while issues are to be tried in another.

The *Morgantown* case, relied on by the court below and by the respondent, is clearly distinguishable for it is held to be "a case of a judge making a ruling as to the manner in which he will try one issue in a civil action pending before himself."

To put it another way, the *Morgantown* case was not a case in which a stay would enjoin one action pending issues to be tried in another, as is the instant case.

Therefore, the test of appealability of the stay order is not whether the action was commenced "at law" rather than "in equity", as respondent contends, but whether the order in substance invokes the normal equitable principles underlying the injunctive processes. If it is the latter, it should be regarded as an injunction and it has been so regarded for purposes of appeal in the following cases:

(1) *International Union v. Colonial Hardwood Floor Co.*, 168 F. 2d 33 pp. 34-35 (CA 4): "The defendants moved for a stay of proceedings pursuant to section 3 of the United States Arbitration Act. 9 U. S. C. A. §3, on the ground that the contract upon which suit was instituted provided for arbitration of the matters in suit. The District Court denied the stay, holding that the contract did not provide for arbitration of these matters and that the United States Arbitration Act had no application because of the exclusion clause contained in the first paragraph thereof. The defendants have appealed from this order; and we think it clear that the denial of stay in such case is, in effect, the denial of an interlocutory injunction, from which

immediate appeal lies to this court. *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583; *Enelow v. N. Y. Life Ins. Co.*, 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440."

(2) *American Locomotive Co. v. Chemical Research Corp.*, 171 F. 2d 115, 119, (CA 6): "[1] The orders [denying stay of proceedings under the Arbitration Act] from which the appeals are taken are not final but are appealable interlocutory orders within the provisions of 28 U.S.C.A. §§225(b) and 227, recodified as of September 1, 1948 as 28 U.S.C.A. §1292(1). *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583; *Gatliff Coal Co. v. Cox*, 6 Cir., 142 F. 2d 876."

(3) *Markel Electric Products, Inc. v. United Electrical, Radio & Machine Workers of America, U. E. et al.*, 202 F. 2d 435, 437, (CA 2): "[1] Such an order is appealable since it is the equivalent of the denial of an injunction. *Enelow v. New York Life Ins. Co.*, 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440; *Shanferoke Coal & Supply Corp. of Delaware v. Westchester Service Corp.*, 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583; *International Union United Furniture Workers of America v. Colonial Hardwood Flooring Co.*, 4 Cir., 168 F. 2d 33."

(4) *Hudson Lumber Co. v. U. S. Plywood Corp.* (CA 9) 181 F. 2d 929, 930 (an action on the equity side): "The order stayed the trial of the action on application of appellees pursuant to 9 U.S.C.A. §3. Such a stay is, in effect, an injunction. Hence the order was appealable" [citing the *Enelow* case, *supra*, 293 U. S. 379; the *Shanferoke* case, *supra*, 293 U. S. 449; the *International Union* case, *supra*, 168 F. 2d 33; the *American Locomotive* case, *supra*, 171 F. 2d 115 and *Gatliff Coal Co. v. Cox* (CA 6) 142 F. 2d 876].

The instant case is the first, to our knowledge, which has ruled that an order issued under section 3 of the United

States Arbitration Act is not appealable and it is in direct conflict with the decision in the *Hudson Lumber Co.* case, *supra*, which like the case at bar, originated on the "equity side" of the district court.

It is also important to observe the statutory nature of the stay order. It is not granted or refused by the district court "by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice" but by virtue of a statutory mandate of the Congress under which district courts are interdicted from entertaining a suit brought in violation of a written agreement to arbitrate. Issued to effectuate the statutory policy, such an order obviously is intended to enjoin or refuse to enjoin the action before the district court in favor of issues to be tried before another tribunal, and its injunctive character is therefore clear.

It is submitted that the ruling of the Second Circuit in the present case not only creates an irrational result but is unsound in principle and is contrary to the intent of Congress. It creates an irrational result because it permits the party who wishes to sidestep arbitration to interdict an immediate appeal on the stay issue by simply *asking* for an accounting. Had respondent in the present case merely sued for damages, he concedes that an immediate appeal would lie from the order issued but by asking for an accounting as well as damages he contends that such an appeal is prohibited.

But more important still is the fact that the function of arbitration would be defeated if the order is not immediately appealable. If defendant must first answer and proceed with an accounting in compliance with legal rules of evidence, it would become pointless on appeal from the

final order to assert the simpler and less costly and less technical trial by the arbitrators. The damage — costly litigation — would have been done. If it is held that the appellate court is powerless to correct an error of that nature, the effect would be a denial to one of the parties of the forum to which he is entitled.

This Court has already ruled in the *Shanferoke* case that it was the intent of Congress to *enjoin* controversies by section 3 of the United States Arbitration Act, even though arbitration could not be *compelled*. It there said (293 U. S. pp. 452-453):

> "* * * Section 3 of the United States Arbitration Act provides broadly that the court may 'stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.' We think the Court of Appeals was clearly right in concluding that there is no reason to imply that the power to grant a stay is conditioned upon the existence of power to compel arbitration in accordance with §4 of the Act. *Marine Transit Corp. v. Dreyfus,* 284 U. S. 263, 274, 76 L. ed. 282, 288, 52 S. Ct. 166, is not to the contrary. There is, on the other hand, strong reason for construing the clause as permitting the federal court to order a stay even when it cannot compel the arbitration. For otherwise, despite congressional approval of arbitration, it would be impossible to secure a stay of an action in the federal courts when the arbitration agreement provides for compulsory proceedings exclusively in the state courts; since only in exceptional circumstances may a state court enjoin proceedings begun in a federal court."

In accordance with this ruling it was said in *Donahue v. Susquehanna Collieries Co.* (CA 3) 138 F. 2d 3, at pages 5 and 6: "* * * in §3 the statute deals with the conduct of suits in federal courts, again a subject matter of con-

gressional power. The language becomes general: 'any suit or proceeding', upon 'any issue referable to arbitration under an agreement in writing for such arbitration' are the words. Congress is not limited, in legislating as to law suits in federal courts, to those suits involving matters where the substantive rights of the parties may be controlled by federal legislation. The generality of the language used in the statute does not suggest any self-imposed limitation. Nor do we think that the 'congressional approval of arbitration' should be so limited by implication, by a grudging type of construction carried down from the days of judicial hostility to all arbitration agreements. We think it clear that the provisions of §3 are not to be limited to the specific instances dealt with in §2."

To the same effect see: *Agostini Bros. Bldg. Corp. v. U. S.*, 142 F. 2d 854, and *Lewittes & Sons v. United Furniture Workers of America, CIO*, 95 F. Supp. 851.

The statutory power of the district court to enjoin an action although it cannot compel arbitration of the controversy further demonstrates the injunctive character of an order issued under the provisions of section 3 of the Arbitration Act.

Respondent relies on *Shoenamsgruber v. Hamburg American Lines*, 294 U. S. 454, which, we submit, is distinguishable from the case at bar. There an *admiralty* action was brought against a steamship company for damages on account of personal injuries inflicted upon an infant passenger. The company denied the material allegations of the libel and set up an arbitration agreement as the basis for a stay under section 3 of the Arbitration Act. The libelants opposed the application for a stay claiming that the child was carried as a passenger not under the

contract alleged in the steamship company's answer, but under another contract that contained no provision for arbitration. The court ordered the parties to arbitrate and granted a stay of the admiralty action pending the filing of the award. The Court of Appeals held that the interlocutory stay order was not appealable and this Court affirmed because courts of *admiralty* do not issue *injunctions* except in a limitation of liability proceeding. The Court there said (294 U. S. 457-458): "While courts of admiralty have capacity to apply equitable principles in order the better to attain justice, they do not have general equitable jurisdiction and, except in limitation of liability proceedings, they do not issue injunctions."

Because the court lacked general equitable jurisdiction to issue an injunction in the *Shoenamsgruber* case, the order there was obviously not appealable under the provisions (1) of section 1292 of the Judicial Code.

Conclusion

Since an interlocutory order granting or refusing a stay under the provisions of section 3 of the United States Arbitration Act, when issued by a district court exercising general equitable jurisdiction, is injunctive in character, it should be regarded as an interlocutory injunction for purposes of appeal.

It is therefore respectfully requested that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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